

FILED

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

08 JUL 11 AM 11:04

*M. J. Fariz*

UNITED STATES OF AMERICA

v.

SAMI AMIN AL-ARIAN,  
SAMEEH HAMMOUDEH,  
GHASSAN ZAYED BALLUT,  
HATIM NAJI FARIZ

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CASE NO.: 8:03-CR-77-T-30-TBM

**RESPONSE BY THE UNITED STATES  
TO MOTION FOR RECONSIDERATION OF ORDER  
DENYING MOTION FOR GRAND JURY TRANSCRIPTS  
BY DEFENDANTS HATIM NAJI FARIZ AND GHASSAN ZAYED BALLUT**

The United States responds in opposition to the Motions for Reconsideration by Defendants Fariz and Ballut and in support thereof states the following:

On September 5, 2003, Defendant Hatim Naji Fariz filed a motion for grand jury transcripts. Doc. 254. He sought the transcripts only to support a motion to dismiss the indictment "for lack of probable cause." Doc. 254 at 1. Defendant Ghassan Ballut filed a motion to adopt Fariz's motion for grand jury transcripts on October 1, 2003. Doc. 297. The United States filed a response in opposition to both defendants' motions on October 6, 2003. Doc. 307. The United States Magistrate Judge issued an Order denying the defendants' motions on October 24, 2003. Doc. 338.

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Upon review of the defendants' motions, the Court concluded that the defendants failed to show that the disclosure of the grand jury transcripts was necessary or appropriate. Doc. 338 at 4. The Court found that the defendants' motions failed because of their stated reason for disclosure which essentially raised a sufficiency of the evidence challenge. This was based upon the government's April 8, 2003 announcement that the government had received information that the identification of Awda in Overt Act 253 was incorrect and suspected the identification of him in Overt Acts 236, 240 and 247 was also wrong. Doc. 338 at 4-5. The government stated during the announcement that no information had been received which indicated that the subject matter of these calls as described in these overt acts was inaccurate. A reading of these calls reveals that they remain inculpatory as to the defendants Fariz (Overt Acts 236, 240, 247 and 253) and Ballut (Overt Acts 240 and 247) even without the participation of Abd Al Aziz Awda. In the context of the trial, these calls are now only exculpatory as to Awda as they show that Fariz and Ballut knew to whom they were speaking and the subjects of their conversations. Additionally, it is revealing that there has been no argument raised by either that they were engaged in protected speech.

The Court correctly found that the main flaw in Fariz's argument was that he sought the transcripts only to support a motion to dismiss the indictment "for lack of probable cause." Doc. 338 at 4-5. The governing authority is clear. A defendant cannot successfully challenge his indictment based on the sufficiency of the evidence before the grand jury, as such a challenge would deplete the Court's resources by

necessitating a preliminary trial. Costello v. United States, 350 U.S. 359, 363 (1956) (“If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. . . . An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits.”); United States v. Cruz, 478 F.2d 408, 412 (5th Cir. 1973) (stating in the face of defendant’s argument that the grand jury had no probative evidence of guilt before it: “We will not review the sufficiency of the evidence, if any, supporting the grand jury indictments in this case”). Fariz’s motion to dismiss was particularly inappropriate because he apparently wished to challenge probable cause not based on any insufficiency of the evidence as it actually was presented to the grand jury, but by bringing after-acquired exculpatory information--like the United States’ information concerning the identification of Awda in Overt Act 253--to bear on the grand jury’s evidence. There is no duty, however, to present even “substantial” exculpatory evidence to the grand jury in the first place, United States v. Williams, 504 U.S. 36, 39, 51-54 (1992). Thus, Fariz cannot attack the grand jury’s probable cause to indict by pointing to postindictment exculpatory evidence that the grand jury could not have considered. Cf. Williams (district court may not dismiss indictment for failure to present exculpatory evidence). Fariz’s asserted need for the transcripts--to file a motion to dismiss for lack of probable cause--was, therefore, illusory.

To the extent that Fariz suggested the grand jury proceedings should be thrown open because it was the United States that learned postindictment of exculpatory information casting doubt on evidence before the grand jury, that suggestion is unsupported. As the Eleventh Circuit held in United States v. DiBernardo, 775 F.2d 1470 (11th Cir. 1985), a case in which the parties learned postindictment that a government agent may have given false testimony before the grand jury: "Assuming, for sake of argument, that the issue is still open, we reject the proposition appellees advance, that, absent a deliberate abuse of the grand jury process, a district court can dismiss a grand jury indictment in the exercise of its supervisory power." Id. at 1475.<sup>1</sup> There has been no suggestion of prosecutorial misconduct that might allow an attack on the indictment. Doc. 338 at 5-6. To the contrary, the United States behaved ethically by immediately bringing this information to the attention of the Court and the defendants since it had a bearing on Fariz's detention status.

Even if postindictment information might call an indictment into question based on the sufficiency of the evidence before the grand jury, Fariz has provided no reason for the court to lift grand jury secrecy in this case. Fariz moved for disclosure based on the

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<sup>1</sup>The Supreme Court's decision in United States v. Williams, 504 U.S. 36 (1992), casts doubt on caselaw allowing district courts to exercise their supervisory power to dismiss indictments based on the government's conduct in presenting evidence to the grand jury. See LaFave, Israel, and King, Criminal Procedure, § 15.5(b), as updated by the 2003 pocket part. As the Williams Court stated: "It would make little sense . . . to abstain from reviewing the evidentiary support for the grand jury's judgment [as required in Costello, etc.] while scrutinizing the sufficiency of the prosecutor's presentation. A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was 'incomplete' or 'misleading.'" Williams, 504 U.S. at 54. Regardless, as explained in text, there is no suggestion of misconduct here.

postindictment information concerning the misidentification of Awda in Overt Act 253 and the United States' resulting suspicions whether Awda was a speaker or mentioned in the other three over acts. Fariz and Ballut, however, have filed motions to dismiss those counts that they consider to be based on the information in Overt Act 253, as well as those counts that are based on the information that the United States considers "suspect," see Docs. 250, 256, and 298; thus, they clearly did not need the transcripts to prepare motions to dismiss those counts.

Fariz and Ballut have tapes of the telephone conversations which made up the overt acts at issue here. Their possession of the very conversations they claim to suspect should negate any claim of "particularized need" for grand jury transcripts reiterating those conversations. See Lucas v. Turner, 725 F.2d 1095, 1101 (7th Cir. 1984) (finding no particularized need when, among other things, the parties had "failed to demonstrate . . . that the information contained [in the grand jury materials] could not have been obtained through normal discovery channels."); cf. United States v. Sells Engineering, Inc., 463 U.S. 418, 431 (1983) (rejecting argument that savings in time may justify grand jury disclosure to civil government attorney as: "In most cases, the same evidence that could be obtained from the grand jury will be available through ordinary discovery or other routine avenues of investigation."). Moreover, these defendants' continued failure to use the tapes to support their speculation that other telephone conversations might have been misinterpreted suggests that they hold no real suspicions regarding the grand jury's interpretation of those other conversations as they should recognize their own voice and to whom they were speaking.

These requests for the grand jury transcripts, therefore, appear to merely be a “fishing expedition.” Indeed, they admitted that they wished to peruse the transcripts to determine whether “other counts and overt acts attributed to them, either directly or through conspiracy theories, are factually accurate.” Doc. 254 at 6, suggests that they were searching not so much for information on the integrity of the grand jury, but for information regarding the charges against them so that they might better prepare for trial. Such a desire to use grand jury materials for general discovery purposes is not a “particularized need” and is wholly inadequate to overcome Rule 6(e)’s prohibition on disclosure. United Kingdom v. United States, 238 F.3d 1312, 1321 (11th Cir. 2001) (upholding order from S.D. Fla. denying motion to disclose grand jury materials and citing United States v. Rockwell Int’l Corp., 173 F.3d 757, 760 (10th Cir. 1999) (“No grand jury testimony is to be released for the purpose of a fishing expedition or to satisfy an unsupported hope of revelation of useful information.”)); Grand Jury Proceedings, Special September, 1986, 942 F.2d 1195, 1195-96 & 1198-99 (7th Cir. 1991) (reversing district court order granting disclosure as abuse of discretion because movant had failed to show “particularized need” when he appeared simply to be “fishing for testimony that possibly might produce evidence beneficial to” him in another proceeding).

Finally, if these defendants had shown a need for the grand jury transcripts that outweighed the need for secrecy, their request is still not structured to allow the Court to lift secrecy “discretely and limitedly” under the third prong of Douglas Oil, 441 U.S. at 222. Despite Fariz’s claim that his request was “narrowly tailored,” he does not limit his request to any of the grand jury transcripts. Instead, he maintains that he should

receive any and all materials that "pertain to him." As he himself points out, Doc. 254 at 5, Fariz has been charged with conspiracy as well as substantive crimes. Moreover, according to the grand jury's allegations, that conspiracy effectively overarches and encompasses virtually all of the substantive crimes alleged in the indictment. The Court properly found that here such a request would "quite literally involve a review of the transcript in its entirety." Doc. 338 at 6-7.

WHEREFORE, the previous Order (Doc. 338) should be affirmed.

Respectfully submitted,

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By:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent  
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